

CIVIL SERVICE COMMISSION MINUTES
APRIL 1, 2009

A special meeting of the Civil Service Commission was held at 2:30 p.m., in Room 358 of the County Administration Center, 1600 Pacific Highway, San Diego, California.

Present were:

A.Y. Casillas
Barry I. Newman
Francesca Krauel
W. Dale Bailey

Absent was:

None

Comprising a quorum of the Commission

Support Staff Present:

Patt Zamary, Executive Officer
Karen F. Landers, Senior Deputy County Counsel
Selinda Hurtado-Miller, Reporting

Approved
Civil Service Commission
May 6, 2009

SAN DIEGO COUNTY CIVIL SERVICE COMMISSION
SPECIAL MEETING MINUTES
APRIL 1, 2009

1:00 p.m. CLOSED SESSION: Discussion of Personnel Matters
and Pending Litigation

2:30 p.m. OPEN SESSION: Room 358, 1600 Pacific Highway, San
Diego, California

| <u>Discussion Items</u> | <u>Continued</u> | <u>Referred</u> | <u>Withdrawn</u> |
|-------------------------|------------------|-----------------|------------------|
| 3,4,5,6,7,8,9 | | | |

COMMENTS: Motion by Newman to approve all items not held for
discussion; seconded by Krauel. Carried.

CLOSED SESSION AGENDA
County Administration Center, Room 400B
(Notice pursuant to Government Code Sec. 54954.2)
Members of the public may be present at this
location to hear the announcement of the
closed session agenda.

A. Commissioner Casillas: CONSIDERATION OF PUBLIC
EMPLOYEE DISCIPLINE (GOV. CODE SEC. 54957(b)) Julie
Buechler, Esq., on behalf of **2008-08**, appealing an
Order of Immediate Suspension and Charges from the
Sheriff's Department.

B. Commissioner Newman: CONSIDERATION OF PUBLIC
EMPLOYEE DISCIPLINE (GOV. CODE SEC. 54957(b)) **Michael
Peabody**, former Road Maintenance Worker, appealing an
Order of Removal and Charges from the Department of
Public Works.

C. Commissioner Bailey: CONSIDERATION OF PUBLIC
EMPLOYEE DISCIPLINE (GOV. CODE SEC. 54957(b)) **Andrew
Rappaport**, former Mental Health Case Management
Clinician, appealing an Order of Removal and Charges
from the Health and Human Services Agency.

D. Commissioner Casillas: CONSIDERATION OF PUBLIC EMPLOYEE DISCIPLINE (GOV. CODE SEC. 54957(b)) Julie Buechler, Esq., on behalf of **2009-01**, appealing an Order of Pay Step Reduction and Charges from the Sheriff's Department.

E. CONFERENCE WITH LEGAL COUNSEL-EXISTING LITIGATION (GOV. CODE SEC. 54956.9(a)) San Diego County Library v. San Diego County Civil Service Commission, Superior Court Case No. 37-2009-00085505-CU-WM-CTL.

OPEN SESSION AGENDA
County Administration Center, Room 358

MINUTES

1. Approval of the Minutes of the regular meeting of March 4, 2009.

Approved.

CONFIRMATION OF ASSIGNMENT

2. Commissioner Krauel: Sarah Smith-Withey, Worksite Organizer, SEIU Local 221, on behalf of **Samuel Adelan**, former Legal Support Assistant II, appealing a Final Order of Dismissal and Removal from County Employment and Charges (Termination) from the Office of the District Attorney.

Confirmed.

DISCIPLINE

Findings

3. Commissioner Casillas: Julie Buechler, Esq., on behalf of **2008-08**, appealing an Order of Immediate Suspension and Charges from the Sheriff's Department.

FINDINGS AND RECOMMENDATIONS:

The matter of the appeal of 2008-08, ("Employee"), from a written Order of Immediate Suspension suspending Employee from the class and position of Deputy Sheriff (Class No. 5746) in the Sheriff's Department, ("Department"), was presented to the Civil Service Commission. The Commission appointed Commissioner A. Y. Casillas, one of its members, to hear the appeal and submit findings, conclusions, and

recommendations to the Civil Service Commission. Pre-hearing briefing was requested to determine the scope and legal issues underlying Employee's appeal. Pursuant to the established briefing schedule, Employee filed a pre-hearing brief on October 16, 2008 and the Department filed its pre-hearing brief on October 29, 2008.

After reviewing the pre-hearing briefs and applicable statutes, case law and Civil Service Rules, the Hearing Officer held that the Order of Immediate Suspension was not defective on its face. Based on the arguments presented by Employee, the Hearing Officer restricted the scope of the appeal hearing to the issue of "whether the Department satisfied the requirements of Labor Code section 432.7 and performed an independent investigation which, coupled with the fact of the arrest, provide a sufficient basis for an indefinite suspension without pay pending the resolution of the criminal charges against the appellant." Thereafter, the matter was duly noticed and came on for hearing on January 22, 2009.

Employee is a Deputy Sheriff suspended by the Sheriff's Department pending the outcome of criminal charges against Employee. At the Commission hearing, the Department presented testimony establishing that prior to suspending Employee, they reviewed the evidence obtained in the criminal investigation of Employee, and they reviewed the decision of the District Attorney's Office to prosecute Employee. Additionally, the Department presented testimony regarding the nature of the evidence against Employee in the criminal prosecution. Employee presented no rebuttal evidence, relying instead on Labor Code § 432.7(a), which proscribes the use of "any record of arrest or detention that did not result in conviction" in determining a condition of employment such as discipline. However, the Department did not rely merely on the record of arrest in deciding to suspend Employee. The Department reviewed the criminal investigation, the evidence uncovered thereby, and the District Attorney's decision to prosecute, in making its decision. The Department established that the District Attorney's case against Employee is sufficient to support suspension pending the outcome of the criminal prosecution. Accordingly, it is hereby recommended that the Order of Immediate Suspension be affirmed; and that proposed decision shall become effective upon the date of approval by the Civil Service Commission.

Motion by Casillas to approve Findings and Recommendations; seconded by Newman. Carried.

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|---------------------------|---------------------------------|
| AYES: | Casillas, Newman, Bailey |
| NOES: | None |
| ABSENT: | None |
| ABSTENTIONS: | None |
| NOT PARTICIPATING: | Krauel |

4. Commissioner Newman: **Michael Peabody**, former Road Maintenance Worker, appealing an Order of Removal and Charges from the Department of Public Works.

FINDINGS AND RECOMMENDATIONS:

The matter of the appeal of Michael Peabody ("Employee"), from a written Order of Removal and Charges removing him from the class and position of Road Maintenance Worker (Class No. 6023) in the Department of Public Works ("Department") was presented to the Civil Service Commission. The Commission appointed Barry I. Newman, one of its members, to hear the appeal and submit findings, conclusions, and recommendations to the Civil Service Commission. Thereafter, the matter was duly noticed and came on for hearing on February 19, 2009.

Employee was a Road Maintenance Worker assigned to the Department's Spring Valley Station (Station 15). Employee was terminated as a result of sustained charges of misconduct involving two incidents. First, it was alleged that while controlling traffic near a road repair site, he repeatedly failed to flag traffic to a stop. Second, it was alleged that he shattered the windshield of a Department truck with his fists during a fit of anger and then lied about it to his supervisors. At the Commission hearing, the Department presented evidence of its charges and Employee presented evidence which attempted to mitigate rather than refute the charges. Employee argued that the traffic flagging incident was exaggerated and that harassment by co-workers caused his tantrum and his attempt to cover it up. While there did appear to be occasional derisive and unprofessional conduct by some of Employee's co-workers, it did not excuse the severity of his own conduct, especially the unsafe traffic control practices and the dishonesty about the cracked windshield. Accordingly, it is hereby recommended that the Order of Removal be affirmed; and that the proposed decision shall become effective upon the date of approval by the Civil Service Commission.

Motion by Newman to approve Findings and Recommendations; seconded by Bailey. Carried.

5. Commissioner Bailey: Ellen Dowd, Esq., on behalf of **Andrew Rappaport**, former Mental Health Case Management Clinician, appealing an Order of Removal and Charges from the Health and Human Services Agency.

FINDINGS AND RECOMMENDATIONS:

The matter of the appeal of Andrew Rappaport, (Employee), from a written Order of Removal and Charges removing him from the class and position of Mental Health Case Management Clinician (Class No. 4835) in the Health and Human Services Agency, (Agency), was presented to the Civil Service Commission. The Commission appointed Commissioner W. Dale Bailey, one of its members, to hear the appeal and submit findings, conclusions, and recommendations to the Civil Service Commission. Thereafter, the matter was duly noticed and came on for hearing on February 26, 2009.

Employee was a Mental Health Case Management Clinician in the Behavioral Health Division of the Agency. He was assigned to the County's mental health facilities at 3340 Kemper Street. His employment with the County was terminated as the result of an investigation in which it was found that he had pushed a co-worker into on-coming traffic, then fled, and then denied any involvement. At the Commission hearing, Employee denied the factual charges. He also claimed that his due process rights were violated because the Agency did not provide him with all documents in its possession that were related to the charges. At the Commission hearing, two independent witnesses testified that they saw Employee push the co-worker. Additionally, testimony established that Employee received all documents reviewed by the Appointing Authority in determining that Employee should be removed from his position. No further production of documents is required prior to the Skelly conference. Accordingly, it is hereby recommended that the Order of Removal be affirmed; and that the proposed decision shall become effective upon the date of approval by the Civil Service Commission.

Motion by Bailey to approve Findings and Recommendations; seconded by Newman. Carried.

6. Commissioner Casillas: Julie Buechler, Esq., on behalf of **2009-01**, appealing an Order of Pay Step Reduction and Charges from the Sheriff's Department.

FINDINGS AND RECOMMENDATIONS:

The matter of the appeal of 2009-01, ("Employee"), from a written Order of Pay Step Reduction and Charges reducing Employee's pay equivalent to a period of three (3) workdays (25.5 hours) in the class and position of Deputy Sheriff-Detentions (Class No. 5757) in the Sheriff's Department, ("Department"), was presented to the Civil Service Commission. The Commission appointed Commissioner A. Y. Casillas, one of its members, to hear the appeal and submit findings, conclusions, and recommendations to the Civil Service Commission. Thereafter, the matter was duly noticed and came on for hearing on March 11, 2009.

Employee is a Deputy Sheriff-Detentions assigned to a detention facility. Employee received a three day pay step reduction as a result of charges that Employee unfairly prevented an inmate from attending a class and prevented a visitor from visiting an inmate. The charges allegedly occurred in two separate incidents. At the Commission hearing, the evidence established that both the inmate and the visitor were late to their respective appointments. However the degree of tardiness was disputed. Employee and the Department provided distinctly different accounts of the incident involving the inmate who was not allowed to go to the class. Employee had no recollection of turning away a visitor. The Department relied solely on hearsay evidence to prove the charges. The hearsay evidence did not supplement or explain competent evidence regarding anything that was disputed. As such, it was inadmissible to disprove Employee's version of the incidents. Additionally, the Department presented no evidence that it communicated any procedures, policies, or objectives involving late inmates or visitors. Accordingly, the Department failed to prove its charges and it is hereby recommended that the Order of Pay Step Reduction be reversed; that Employee be awarded back pay, benefits, and interest relating to the Order of Pay Step Reduction; and that the proposed decision shall become effective upon the date of approval by the Civil Service Commission.

Motion by Casillas to approve Findings and Recommendations; seconded by Bailey; carried.

DISCRIMINATION

Findings

7. Commissioner Newman: Stephen McLaughlin, Sr., J.D., on behalf of **Deborah J. McLaughlin**, Land Use Technician I, alleging discrimination by the Department of Planning and Land Use.

Stephen McLaughlin, Sr., J.D., on behalf of Deborah J. McLaughlin, stated that an allegation of retaliation was not addressed in Ms. McLaughlin's Rule VI complaint, and perhaps should have been included.

FINDINGS AND RECOMMENDATIONS:

At the special meeting of the Civil Service Commission on January 14, 2009, the Commission appointed Barry I. Newman to investigate the complaint submitted by Deborah McLaughlin, which alleged discrimination by the Department of Planning and Land Use. In accordance with the established rules and procedures of the Commission, the matter was concurrently referred to the Office of Internal Affairs (OIA) for investigation. The OIA concluded the investigation and has reported its findings to the Commission.

The Investigating Officer has taken into consideration all documentation submitted in this matter. The report of OIA has been received and reviewed by the undersigned Investigating Officer who concurs with OIA's Report and has concluded that the evidence does not support a finding of probable cause that a violation of discrimination laws occurred. It is therefore recommended that Ms. McLaughlin's Rule VI discrimination complaint be denied; and the Commission approve and file this report with the appended OIA Summary Investigative Report with a finding of no probable cause to believe that the Complainant has been unlawfully discriminated against.

Motion by Newman to approve findings and recommendations; seconded by Krauel. Carried.

8. Commissioner Krauel: **Lynda Coburn**, Office Assistant, alleging discrimination by the Health and Human Services Agency.

FINDINGS AND RECOMMENDATIONS:

At the special meeting of the Civil Service Commission (Commission) on January 14, 2009, the Commission appointed Francesca Krauel to investigate the complaint submitted by Linda Coburn, which alleged discrimination by the Health and Human Services Agency. In accordance with the established rules and procedures of the Commission, the matter was concurrently referred to the Office of Internal Affairs (OIA) for investigation. The OIA concluded the investigation and has reported its findings to the Commission.

The Investigating Officer has taken into consideration all documentation submitted in this matter. The report of OIA has been received and reviewed by the undersigned Investigating Officer who concurs with OIA's Report and has concluded that the evidence does not support a finding of probable cause that a violation of discrimination laws occurred. It is therefore recommended that Ms. Coburn's Rule VI discrimination complaint be denied; and that the Commission approve and file this report with the appended OIA Summary Investigative Report with a finding of no probable cause to believe that the Complainant has been unlawfully discriminated against.

Motion by Krauel to approve findings and recommendations; seconded by Newman; carried.

OTHER MATTERS

Seal Performance Appraisal

9. **2009-03**, Probation Department, requesting the sealing of a performance appraisal covering the period June 30, 2007 through June 29, 2008. (Continued from the March 4, 2009 meeting.)

RECOMMENDATION: Deny Request

Appellant 2009-03 stated that he is aware that the Commission may seal a performance appraisal for procedural flaws, but he also wanted to be heard regarding his further concerns. He stated that not only was the performance appraisal given to him untimely, but the violations noted in the appraisal were never brought to his attention prior to his review of the performance appraisal. Appellant stated that he feels he was a victim of retaliation and a hostile work environment.

Appellant disagrees with Commissioner Newman's stance that a timeliness violation is not enough to seal a performance appraisal, leaving a "hole" in the history of an employee's performance. Appellant further stated that all County employees are held to a strict standard of following rules and procedures and that County departments likewise should be held to that same standard. He feels the Department had several reminders and sufficient time to issue his performance appraisal timely, but chose not to do so.

Commissioner Newman answered Appellant's statements by explaining that his position is his statement, and not that of the entire Commission. He agreed with Appellant that rules and procedures should be followed by the departments

as well as its employees, and there should be consequences if not followed. However, Commissioner Newman continues to believe that timeliness issues are not sufficient violations in order to seal a performance appraisal.

Commissioner Newman further expressed that Appellant's Performance Appraisal is a perfect example of the process of appealing a performance appraisal. It clearly reflects a positive performance and the negative factors mentioned were overruled and changed by the process. Commissioner Newman feels that the delays did not cause harm to the Appellant and finds it absolutely critical for future managers of appellant to see the changes and reversals Appellant's performance appraisal details.

**Motion by Newman to approve staff's recommendation;
seconded by Bailey; discussion:**

Commissioner Krauel stated that she agreed substantively with Commissioner Newman, but acknowledges that this Commission has inconsistently applied the standards of CSC Rule V. Commissioner Krauel agreed that procedural rules were violated by several days and agrees that departments must follow all rules and procedures as set forth. Commissioner Krauel believes that this performance appraisal should be sealed and that the County should amend Civil Service Rule V to more adequately cover issues of the sealing of performance appraisals.

Call for vote:

| | |
|---------------------|---------------------------------|
| AYES: | CASILLAS, NEWMAN, BAILEY |
| NOES: | KRAUEL |
| ABSENT: | NONE |
| ABSTENTIONS: | NONE |

Motion carried. Request to seal performance appraisal denied.

Extension of Temporary Appointment

10. Health and Human Services Agency

1 Residential Care Worker Trainee (Elizabeth Church)

RECOMMENDATION: Ratify

Item No. 10 ratified.

11. Public Input.

ADJOURNED: 3:20 p.m.

NEXT REGULAR MEETING OF THE CIVIL SERVICE COMMISSION: MAY 6, 2009

ASSISTANCE FOR THE DISABLED:

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